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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHNNY WITT, et al., *Petitioners*

v.

CALVIN HARBOUR, et al., *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS WITT, HARBOUR, AND THE COUNTY OF PATRICK, VIRGINIA, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A PETITIONER ARRESTED ON A FACIALLY VALID WARRANT FOLLOWING INDICTMENT BY A PROPERLY CONSTITUTED GRAND JURY CAN STATE A CAUSE OF ACTION UNDER 42 U.S.C. §1983 FOR ARREST WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

II. WHETHER A COUNTY IN VIRGINIA HAS POWER OR A DUTY TO TRAIN OR SUPERVISE MEMBERS OF THE COUNTY SHERIFF'S DEPARTMENT SO AS TO RENDER THE COUNTY LIABLE FOR FAILURE OF THE SHERIFF IN THIS REGARD.

III. WHETHER A COMPLAINT SUFFICIENTLY ALLEGES THAT THE ACTIONS OF INDIVIDUAL DEFENDANTS WERE UNDERTAKEN PURSUANT TO AN "OFFICIAL POLICY" OF THE COUNTY REGARDING UNDER-COVER AGENTS WHERE ONLY A SINGLE INCIDENT IS ALLEGED AS THE BASIS FOR THE ASSERTED OFFICIAL POLICY.

PARTIES

Johnny Witt;
Sarah B. Bowman;
Calvin Harbour;
Larry E. Baliles;
Martha Sue Fain;
and
The County of Patrick, Virginia.

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BRIEF FOR RESPONDENTS WITT, HARBOUR, AND THE COUNTY OF PATRICK, VIRGINIA, IN OPPOSITION

OPINION BELOW

The opinion of the United States District Court for the Western District of Virginia is now reported at 508 F. Supp. 378 (W.D. Va. 1980).

STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari ("Petition"), Johnny Witt and Sarah B. Bowman seek reversal of the United States District Court for the Western District of Virginia's dismis-

sal pursuant to Federal Rule of Civil Procedure 12(b)(6) of their virtually identical complaints under 42 U.S.C. §1983 and the affirmance, in an unpublished *per curiam* decision, of that dismissal by the United States Court of Appeals for the Fourth Circuit. The defendants below were Calvin Harbour, formerly Sheriff of Patrick County, Virginia, Larry Baliles, one of Harbour's deputies, Martha Sue Fain, a private citizen allegedly employed by the Patrick County Sheriff's Department as an informant and undercover agent in connection with investigations into illegal drug transactions, and the County of Patrick, Virginia. Witt's and Bowman's cases were consolidated by agreement of counsel for pretrial motions and have been consolidated for all subsequent proceedings.

(a) The Complaints.

The original complaints alleged that Baliles, acting under the supervision and control of Harbour and with Harbour's knowledge and approval, employed Fain as an informant and undercover agent in connection with an investigation of illicit drug activity. Allegedly, Harbour and Baliles should have known of Fain's unreliability and unsuitability for these tasks. Petitioners alleged, and Harbour and Baliles have acknowledged, that Fain reported she had bought drugs from petitioners and gave investigating officers drugs allegedly so bought when in fact Fain had not been involved in any drug transactions with petitioners.

Fain presented her "evidence" of purchases of illicit drugs to a grand jury that returned indictments against petitioners. Criminal warrants thereupon issued for the arrest of petitioners. These indictments were subsequently dismissed when Fain's perjury was first discovered during pretrial proceedings.

Petitioners have not alleged that Harbour and Baliles had actual knowledge of Fain's perjury before the indictments issued or acted with malice toward petitioners. (*See* Petition at 15.)[1] Rather, petitioners alleged that Harbour and Baliles "should have known" of Fain's "lack of reliability" and "incompetence."

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[1]The complaints and opinions and orders of the courts below are reprinted starting at page 28 of the Petition.

(Witt Complaint ¶12, Bowman Complaint ¶11; Petition at 38,43.) The legal core of the complaints is as follows:

> [T]he employment, retaining and supervision of the Defendant Fain was in gross, reckless, wanton and/or negligent disregard of rights, privileges and immunities secured to the [petitioners], and others similarly situated, by the Fourteenth Amendment to the United States Constitution. Among other things, the acts of omission and commission herein attributed to the Defendants Baliles and Harbour, and the actions hereinabove attributed to the Defendant Fain, jointly and severally, directly and foreseeably, deprived the [petitioners] of [their] right and privilege to be secure in [their] personal liberty; to be free of false unfounded public accusations of wrongdoing without probable cause; to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony; to be free of unwarranted public disdain and ridicule.

(Witt Complaint ¶12, Bowman Complaint ¶11; Petition at 39-40, 43-44.)

Amended complaints added the County of Patrick as a defendant and alleged a constitutionally impermissible pattern of misfeasance and nonfeasance condoned by the County and effectuated by Sheriff Harbour, whose acts were alleged to constitute the County's official policy. (Petition at 45-48.)

Harbour and Baliles moved for dismissal under Rule 12(b)(6), and Patrick County moved for dismissal under Rules 12(b)(6) and 12(b)(7). Fain filed no responsive pleading.

(b) The Decisions Below.

In addressing the motions to dismiss under Rule 12(b)(6), the district court, following the analysis of this Court in *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979), inquired first whether any constitutional guarantee had been infringed by the conduct alleged in the complaints. Petitioners urged that their complaints stated a claim for arrest without probable cause in violation of the Fourth

and Fourteenth Amendments. But the district court, relying on *Rodriguez* v. *Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1047 (1978), held that an indictment by a properly constituted grand jury conclusively determines, for constitutional purposes, the existence of probable cause and provides the authority for an arrest warrant to issue. The district court therefore ruled that, by having their cases presented to the grand jury, which returned indictments, the plaintiffs received all the due process to which they were constitutionally entitled at the indictment stage. There being no constitutional deprivation, no defendant could be liable on petitioners' theory of reckless supervision under §1983. The district court accordingly dismissed the complaints as to all defendants.

In an unpublished *per curiam* opinion, the Fourth Circuit affirmed the district court's analysis and result, observing that petitioners had identified the purported arrest without probable cause as the only constitutional violation alleged in the complaints.

SUMMARY OF REASONS FOR DENYING THE WRIT

The courts below fully considered and correctly decided the central issue in this case. Under *Baker* v. *McCollan*, 443 U.S. 137 (1979), a plaintiff must identify a precise constitutional violation in order to state a cause of action under 42 U.S.C. §1983. Petitioners have construed their own complaints to allege a single constitutional violation: arrest without probable cause in violation of the Fourth and Fourteenth Amendments. But the complaints show that petitioners were arrested upon warrants issued after petitioners were indicted by a grand jury, and there are no allegations that the grand jury was improperly constituted or that the warrants were facially invalid. Under these circumstances, sound authority holds that the grand jury's determinations of probable cause are conclusive for constitutional purposes. Since it was clear from the face of the complaints here that no unconstitutional arrests occurred, the complaints were properly dismissed.

The Fourth Circuit's decision in the case does not conflict with decisions from other circuits; the cases cited by petitioners either involve an arrest before indictment or in fact support the

decision of the Fourth Circuit here. Nor is the prior decision of this Court regarding impeachment of affidavits underlying a search warrant relevant to the decisions below concerning the conclusive effect of a grand jury indictment, since the constitutional safeguards on the accuracy of grand jury determinations of probable cause are fundamentally different from those surrounding probable cause findings made by officers or magistrates.

Finally, counties in Virginia have no power or duty to train or supervise members of the County's Sheriff's Department, and so cannot be held liable for the Sheriff's alleged failures in this regard. A complaint, moreover, is legally insufficient under §1983 and *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), when it alleges only a single prior incident as the basis for allegations that actions of individual defendants constituted a custom and usage that was the official policy of the County.

REASONS FOR DENYING THE WRIT

(a) The Central Issue in This Case Was Correctly Decided Below: An Arrest on a Facially Valid Warrant Following Indictment by a Properly Constituted Grand Jury Cannot be the Basis for a Complaint under 42 U.S.C. §1983 for Arrest Without Probable Cause.

The essence of petitioners' claim is that they were unconstitutionally arrested without probable cause in that respondents Harbour and Baliles allegedly mishandled a drug investigation with the result that the petitioners were indicted and arrested on drug charges when an informant perjured herself before the indicting grand jury. But petitioners have conceded that neither Harbour nor Baliles knew beforehand that the informant was going to perjure herself or actively encouraged the perjury.[8] There are no allegations that either Harbour or Baliles acted mali-

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[8]Petition at 15. Counsel for petitioners also acknowledged in oral argument before the United States Court of Appeals for the Fourth Circuit that neither Harbour nor Baliles was the source of the alleged instruction to "get Johnny Witt" that is recited in ¶8 of Witt's original complaint (Petition at 35).

ciously toward petitioners or with deliberate intent to harm them;[3] the allegations are of negligent and reckless conduct with respect to the overall drug investigation and the use of the informant. The record also is uncontradicted that the charges against petitioners were dismissed when the perjury was first discovered during pretrial proceedings.

As the district court recognized, the starting point for analysis of whether a complaint states a cause of action under §1983 must be this Court's recent pronouncement that:

> The first inquiry in any §1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws" [of the United States].

Baker v. *McCollan*, 443 U.S. 137, 140 (1979). In *Baker*, this Court ruled that while a person arrested on a facially valid warrant and held in jail for eight days as a result of mistaken identity has indeed been deprived of his liberty, this deprivation occurred in accordance with due process of law. Even the Sheriff's alleged *intentional* failure to investigate an absolutely dispositive and easily verifiable defense, 443 U.S. at 143, did not violate due process. This Court said:

> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. If it did, §1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released. . . .
>
> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law." . . .

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[3]Petition at 15. Nevertheless, certain language in the Petition could be misread as indicating that malice has been alleged.

> . . .Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. . . .

443 U.S. at 145-46 (footnotes omitted).

The complaints in the case at bar are decidedly oblique when it comes to identifying "the precise constitutional violation with which [the defendants are] charged." *Baker* v. *McCollan*, 443 U.S. at 140. The allegations that the criminal prosecutions begun against petitioners exposed them to "great humiliation, embarrassment, inconvenience, and anguish, all to [petitioners'] permanent shame and damage" and constituted "false unfounded public accusations of wrongdoing without probable cause" that subjected petitioners to "unwarranted public disdain and ridicule" make out a classic state-law action for defamation. (Witt Complaint ¶¶11,12; Bowman Complaint ¶¶10,11; Petition at 38-40, 42-44). But this avenue is foreclosed to petitioners under §1983. *Paul* v. *Davis*, 424 U.S. 693 (1976).

Petitioners also alleged violation of asserted rights and privileges "to be secure in [their] personal liberty," "to be free of false unfounded public accusations of wrongdoing without probable cause," and "to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony." (Witt Complaint, ¶12; Bowman Complaint ¶11; Petition at 39,44). As the district court recognized, in light of the allegations of the informant's perjury petitioners might have made out a state-law cause of action for malicious prosecution against her. (508 F. Supp. at 379-80, Petition at 55.) Petitioners chose, however, not to shape their case along these lines, perhaps out of fear of being left without a solvent defendant or because of the statute of limitations applying to such actions. *See Morrison* v. *Jones*, 551 F.2d 939 (4th Cir. 1977).

Rather, once confronted with the implications of *Baker* v. *McCollan*, 443 U.S. 137 (1979), for any sort of unfocused constitutional attack, petitioners have consistently maintained, as the opinion of the Fourth Circuit notes, that arrest without probable cause is the sole constitutional violation they allege. (Petition at

64.) In support of their position, petitioners rely on cases, with which respondents do not quarrel, establishing that one who has not been indicted and who has been arrested without a valid warrant and without probable cause may have suffered a constitutional deprivation. (Petition at 16-17.)

But petitioners' assertion that *they* have suffered an unconstitutional arrest without probable cause fails beause an indictment by a properly constituted grand jury conclusively determines the existence of probable cause and validates the issuance of an arrest warrant. Petitioners have not alleged that the indictments upon which they were arrested were facially invalid or that the indicting grand jury was biased or illegally constituted. This being the case, the law prohibits a constitutional attack for lack of probable cause on the resulting indictment. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975); *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *Rodriguez* v. *Ritchey*, 556 F.2d 1185, 1191 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1047 (1978). Through the process of indictment by a proper grand jury, petitioners received all of the constitutional protection—all of the due process—to which they were entitled at this stage of the criminal process. *Cf. Baker* v. *McCollan*, 443 U.S. at 145-46.

In the leading case concerning the effect of a pre-arrest indictment in the §1983 context, *Rodriguez* v. *Ritchey*, the Fifth Circuit sitting *en banc* squarely addressed and rejected petitioners' theory. In *Rodriguez*, due to a complicated series of mechanical and human errors during a criminal investigation, Rodriguez, the §1983 plaintiff, became the victim of mistaken identity. The mistake was not discovered until some 15 months after her indictment and arrest on federal charges involving participation in illegal gambling operations. The charges against her were dismissed on the government's motion when the mistaken identification was discovered during pretrial discovery. Rodriguez then filed a *Bivens*-type action directly under the Fourth Amendment against the FBI agents who conducted the investigation that led to her misidentification, alleging an unconstitutional arrest without probable cause because of the deficient police investigation.

Upon a detailed and scholarly analysis, a plurality of the Fifth Circuit held as a matter of law that a person alleging arrest

pursuant to an indictment returned by a properly constituted grand jury has stated no violation of the Fourth Amendment. 556 F.2d at 1190-1192, 1194. The court of appeals ruled that when the district court discovered from the complaint that Rodriguez' arrest followed her indictment by a grand jury, it then became "apparent to a legal certainty that no constitutional violation had been committed as alleged" and the district court should have dismissed the action for want of jurisdiction or for failure to state a claim upon which relief could be granted. 556 F.2d at 1192. Two concurring judges endorsed the plurality's reasoning and disposition and reserved decision only on whether a police officer who maliciously or in bad faith seeks to obtain an indictment may escape liability. 556 F.2d at 1194-95.

The prevailing opinion in *Rodriguez* is based on longstanding precedent. 556 F.2d at 1191 n.22 (cases collected). Chief among these authorities is the decision in *Costello* v. *United States*, 350 U.S. 359, 363 (1956), where this Court held that an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits.[4] Such an indictment, this Court held, is not subject to challenge for the sufficiency, adequacy, or competency of the evidence before the grand jury.[5]

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[4]An indictment is sufficient if it contains the elements of the offense charged, if it fairly informs the defendant of the charge against which he must defend, and if it enables the defendant adequately to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Russell* v. *United States*, 369 U.S. 749, 763-64 (1962).

[5]In light of the plurality opinion in *Rodriguez*, the soundness of which has been ratified by *Baker* v. *McCollan*, 443 U.S. 137 (1979), the courts that have already passed on the case at bar have found it unnecessary to explore an alternative legal basis for dismissing the complaints here. In *Hahn* v. *Sargent*, 388 F. Supp. 445, 452 (D. Mass.), *aff'd*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), the court dismissed a §1983 complaint against a defendant who allegedly gave false testimony to a grand jury that was investigating the plaintiff and that subsequently indicted him. Observing that one who testifies falsely before a grand jury is liable in a criminal action for perjury, the court ruled that any such false testimony is privileged as a matter of public policy in civil actions, including those brought under §1983. The same reasoning led to summary judgment for the defendants in *Bryant* v. *Kentucky*, 490 F.2d 1273 (6th Cir. 1974). Virginia recognizes this absolute privilege against civil liability. *Watt* v. *McKelvie*, 219 Va. 645, 648-51, 248 S.E.2d 826, 828-29

(Footnote continued on next page)

Numerous cases exist, of course, affirming that persons arrested pursuant to some authority other than an indictment may actionably have been denied their rights under the Fourth and Fourteenth Amendments. For instance, when a person is arrested without a warrant, the constitutionally required determination of probable cause must initially be made by a police officer operating under field conditions. The officer's judgment is subject to later scrutiny by a neutral and detached judicial officer in a preliminary hearing, but the initiation of the criminal process, the arrest and consequent deprivation of liberty, have already occurred. Under these circumstances, the law gives no conclusive effect to the initial judgment about probable cause. The existence of this constitutional prerequisite to going forward with the criminal process may be contested at the preliminary hearing, or by way of application for a writ of habeas corpus challenging the legality of pretrial detention, or in a §1983 action for damages or declaratory or injunctive relief. *See generally Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6, 111-115, 117 n.19 (1975); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

But when the criminal process is initiated through investigation by a grand jury that returns an indictment, the federal Constitution recognizes a fundamentally different mechanism for safeguarding the probable cause determination. As Mr. Justice Black wrote for this Court in *Costello* v. *United States*:

> The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand

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(Footnote 5 continued)

(1978); *Elder* v. *Holland*, 208 Va. 15, 21, 155 S.E.2d 369, 374 (1967); *Penick* v. *Ratcliffe*, 149 Va. 618, 627-35, 140 S.E. 664, 667-70 (1927).

In a closely related context, the court in *Brawer* v. *Horowitz*, 535 F.2d 830 (3rd Cir. 1976), affirmed dismissal of a *Bivens*-type damage action alleging that the plaintiff had been deprived of his constitutional right to a fair trail by the perjured testimony of a witness. Observing that the claim at bottom amounted to one of "constitutional defamation," 535 F.2d at 837, the court based its ruling on the ancient common law immunity from civil liability enjoyed by witnesses in criminal proceedings. *Brawer* was cited with approval, and the absolute nature of witness immunity from §1983 actions confirmed, in *Burke* v. *Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. *The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.* Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. *It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.* And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof. . ."

350 U.S. at 361-63 (footnotes and citation omitted; emphasis added). Mr. Justice Powell writing for this Court has recently

underscored the unique confidence that our Constitution places in the determinations of the grand jury:

> The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution.

Gerstein v. *Pugh*, 420 U.S. 103, 117, n.19 (1975).

Under our Constitution, facially valid indictment by a proper grand jury is deemed a sufficient guaranty that probable cause underlies the criminal prosecution instituted by the indictment. Consistently with this position, no hearing is afforded for reviewing the basis for arrest following indictment. Likewise, pretrial confinement pursuant to a valid indictment cannot be challenged collaterally by way of application for a writ of habeas corpus. *See, e.g., United States ex rel. Potts* v. *Rabb*, 141 F.2d 45, 47 (3d Cir.), *cert. denied*, 322 U.S. 727 (1944); *Ellis* v. *New Jersey*, 282 F. Supp. 298, 302-03 (D. N.J. 1967), *aff'd per curiam*, 388 F.2d 988 (3d Cir. 1968) (adopting the reasoning of the district court). *Cf. Guthrie* v. *Boles*, 261 F. Supp. 852, 853-55 (N.D. W.Va. 1967). Nor, as *Rodriguez* v. *Ritchey*, reaffirms, can the grand jury's determination be challenged collaterally in a §1983 or *Bivens*-type action.

The grand jurors in the cases at bar could properly have considered a great many things, including their own knowledge, actual or supposed, of the petitioners as well as the results of the police investigation and the perjured testimony of Fain, in reaching their decisions to indict. Petitioners cannot, however, inquire into these matters by way of a §1983 suit. In the absence of allegations of bias or improper constitution in the grand jury or deficiency in the form of the indictments, the grand jury's determinations of probable cause are conclusive.

Respondents therefore respectfully submit that the circuit and district courts in the case at bar correctly decided that petitioners' indictments were conclusive on the issue of probable cause and that the complaints state no cause of action for unconstitutional arrest.

(b) The Decisions Below Do Not Conflict With Considered Opinions of Any Other Circuit.

Petitioners assert that the decisions below conflict with *Attreau* v. *Morris*, 357 F.2d 871 (7th Cir.), *cert. denied*, 385 U.S. 832 (1966). This case, however, affords no substantial support for petitioners' position.

First, *Attreau* involves a clearly-alleged instance of arrest without a warrant and without probable cause, 357 F.2d at 872-73, which of course *does* state a claim for relief under §1983. While the plaintiff in *Attreau* was ultimately indicted and included this incident in his recital of wrongs suffered, the criminal process was first brought to bear on the plaintiff through a warrantless arrest. Second, the *Attreau* court's discussion of the effect of indictment following arrest, 357 F.2d at 874-75, is uninformed by the federal law, cited in *Rodriguez* v. *Ritchey* and discussed in this brief, on the effect of indictments preceding arrest and relies entirely on analogy with state law relating to malicious prosecution. As the district court pointed out in the case at bar, the constitutional effect of a grand jury indictment for §1983 purposes is one thing; the effect of that indictment in a state civil action for malicious prosecution is quite another. (508 F. Supp. at 379-80, n.3; Petition at 58-59.) Finally, *Attreau* antedates *Baker* v. *McCollan*, 443 U.S. 137 (1979). Thus, its generalized pronouncements—which are not tied to specific constitutional guarantees—about what does and does not state a cause of action under §1983 are of extremely dubious authority.

Petitioners also apparently assert that the Fifth Circuit's opinon in *Rodriguez* v. *Ritchey* "is in direct conflict with" the Fourth Circuit's decision in this case. *Rodriguez* has been sufficiently discussed already to demonstrate that it is in harmony—and not in conflict—with the decisions in the case at bar. The district court below recognized this harmony. (508 F. Supp. at 379 and n.2; Petition at 55, 58 n.2.)

Petitioners try to distinguish *Rodriguez* on its facts from the case at bar. (Petition at 13-14.) But it is plain from the prevailing opinion in *Rodriguez*, 556 F.2d at 1192, 1194, that the only facts important to the *Rodriguez* court were that the plaintiff was indicted by a grand jury, alleged no impropriety in the constitu-

tion of the grand jury and no facial invalidity in the warrant, was arrested following indictment, and alleged no use of unreasonable force in the arrest. *Rodriguez* is squarely on point with the case at bar as regards these material facts.

Petitioners also seek to exploit the reservation by the concurring judges in *Rodriguez* of decision in a case where "an officer maliciously or in bad faith seek[s] to obtain an indictment from a grand jury." 556 F.2d at 1195. Yet petitioners admit they have not alleged and cannot prove that Harbour and Baliles knew of Fain's perjury, and it bears repeating here that, contrary to the implications of some portions of petitioners' argument, petitioners nowhere have alleged malice, nor is there any allegation of "deliberate falsification" by Harbour or Baliles. It does not detract in the least from the precedential authority of *Rodriguez* that two judges in that case were unwilling to commit themselves on a point irrelevant to the instant case.[6]

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[6]The reservation in the *Rodriguez* concurrence suffers from the same lack of focus on a particular constitutional violation that this Court found objectionable in *Baker* v. *McCollan*, 443 U.S. 137 (1979). Indeed, Judge Gee, one of the concurring judges in *Rodriguez*, wrote the opinion in *Baker* that this Court reversed.

Moreover, these concurring judges apparently were unaware of the cases, which might have resolved their uncertainty, holding that an erstwhile criminal defendant may not maintain a §1983 action upon an allegation that false information contributed to the maintenance of criminal proceedings against him when those proceedings have ended in acquittal or dismissal of the charges. In *Symkowski* v. *Miller*, 294 F. Supp. 1214 (E.D. Wis. 1969), the court found no §1983 action to lie where plaintiff alleged a deprivation of constitutional rights because three police officers testified falsely during trials against the plaintiff that resulted in acquittal. The court distinguished cases in which the prosecution, through the knowing use of perjured testimony, actually obtained a conviction—a situation which, the court thought, does give rise to a §1983 action. 294 F. Supp. at 1216-17. Implicit in the court's discussion and holding is the proposition that when a criminal prosecution ends in acquittal, the defendant has necessarily received due process regardless of whether erroneous and even knowingly false testimony was proffered against him.

In *Grisom* v. *Logan*, 334 F. Supp. 273, 276-77 (C.D. Cal. 1971), the court held that the alleged falsification of evidence at the §1983 plaintiff's preliminary hearing obviously did not deprive the plaintiff of any due process since the charges were dismissed. Once more, the court distinguished cases where perjured testimony is used to convict someone.

(Footnote continued on next page)

Petitioners apparently would have this Court reject the reasoning of the plurality in *Rodriguez* and the precedent underlying that opinion, and instead adopt the position of the *Rodriguez* dissenters. This Court has, of course, already declined one such invitation, since a petition for a writ of certiorari in *Rodriguez* was denied. 434 U.S. 1047 (1978). Moreover, the essential premise upon which the position of those dissenters was based is now clearly incorrect. The dissenters began with and repeatedly referred to the assumption that the Constitution guarantees citizens "the right not to be indicted and arrested for crimes of which they know nothing and of which they are altogether innocent." 556 F.2d at 1195, 1201, 1205, 1206. Being unable to cite precedent for their position, the dissenters instead relied on an appealing emotional argument: erroneous prosecutions *ought* not to occur. 556 F.2d at 1206.

But in *Baker* v. *McCollan*, 443 U.S. 137 (1979), this Court rejected the premise of the *Rodriguez* dissenters' argument:

> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. If it did, §1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released.

(Footnote 6 continued)

These decisions confirm the commonsense proposition upon which *Baker* v. *McCollan*, 443 U.S. at 145, in part rests: if these plaintiffs have a cause of action under §1983, so does *every* acquitted defendant and released suspect.

The *Symkowski* and *Grisom* cases also dispose of the hint, dropped by the petitioners but not pursued, that their cases involve assertion of some sort of right to "fundamental fairness" under the due process clause of the Fifth Amendment. (Petition at 25.) As these cases show, "fundamental fairness," to the extent that it exists as a separate constitutional guarantee, has been accorded where erroneous charges do not produce a conviction. *Cf. Brawer* v. *Horowitz*, 535 F.2d 830, 837 (3rd. Cir. 1976).

443 U.S. at 145 (footnote omitted). The Fourth Amendment protects only against deprivations of liberty accomplished "without due process of law." Where, as in *Baker*, *Rodriguez*, and here, this due process has been afforded, there has been no constitutional violation and there is no cause of action under §1983. The appropriate and sufficient avenue for redress of these quite real injuries "must be sought in state court under traditional tort-law principles." *Baker* v. *McCollan*, 433 U.S. at 146.

(c) The Previous Decision of this Court Concerning Impeachment of Affidavits Underlying Search Warrants, on Which Petitioners Rely, is Inapplicable to the Case at Bar.

Petitioners assert that this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), allowing impeachment of the veracity of affidavits underlying search warrants, enunciates a principle of constitutional law that undermines the decision below in the case at bar. Petitioners' reliance is misplaced. As has been previously pointed out at length in this brief, the Constitution provides two fundamentally different ways of making the probable cause finding that must underlie the initiation of formal criminal processes. One involves use of a field determination of probable cause or the issuance of a warrant by a magistrate. In these instances, the probable cause determination is subject to subsequent judicial scrutiny.

But proceedings before a grand jury are qualitatively and constitutionally different. The grand jury is itself the constitutionally recognized embodiment of due process, and no judicial reevaluation of the grand jury's findings is permitted. Instead, due process is protected through guarantees that the grand jury will be properly constituted and unbiased and that any indictment will meet certain criteria of facial validity. Respondents do not quarrel with the holding of *Franks*. But that holding is just as irrelevant to the issue before this Court as are the other decisions cited by petitioners that deal with the mechanisms that assure due process when some instrumentality other than a grand jury first finds probable cause.

Moreover, the holding in *Franks* is a function of the peculiar demands of the exclusionary rule and the necessity that searches be carefully scrutinized in order that evidentiary rulings

at trial may vindicate defendants' Fourth Amendment rights. 438 U.S. at 164-71. Essentially, *Franks* holds that a defendant must be able to challenge the veracity, as well as the sufficiency, of an affidavit underlying a search warrant if his trial on the merits is to comport with the requirements of the Constitution as expressed in the exclusionary rule. No such need exists in the instant case. Petitioners would have had ample opportunity to challenge the veracity of the perjured testimony had it actually been used against them at trial (which, of course, did not occur because the perjury was discovered before trial and petitioners' rights were vindicated through dismissal of the charges).[7]

(d) This Court Need Not Reach the Issues Involving the Alleged Liability of the County of Patrick for the Actions of the County Sheriff's Department, But Additional Grounds Support Dismissal of the Complaints as to the County.

Since petitioners' complaints were dismissed under F.R.C.P. 12 (b)(6) for lack of allegations of a basic constitutional violation, the courts below never discussed the issues arising out of the County of Patrick's alleged liability for a "pattern and custom" of "gross negligence" in training and supervising the members and employees of the County Sheriff's Department. This Court need not reach these issues, either, since the complaints were properly dismissed for the reasons stated by the courts below. If this Court should deem it appropriate, however, to explore these issues further, respondents respectfully urge that the case should be remanded for development of these issues by the courts below. But since petitioners have raised the issue of the County's liability here, respondents will briefly sketch the additional reasons why the County cannot be held liable.

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[7]It should also be noted that the process of constitutional double check established in *Franks* would be unworkable in the grand jury context. *Franks* calls for a judicial reweighing of the information—excluding arguably tainted information—that was available to the magistrate who first found probable cause. Since the proceedings of grand juries are secret and generally unrecorded, it would be impossible to perform a comparable reevaluation here.

(1) A Virginia County Has No Power or Duty to Supervise or Train Members of the County Sheriff's Department and Hence is Not Responsible for Any Alleged Failures of the Sheriff in This Regard.

Petitioners have alleged that the County has exhibited "gross negligence" and a "pattern and custom of direct misfeasance and/or malfeasance in failing to train, supervise and review and discipline members, agents and employees of the Sheriff's Department." They have also alleged that the Sheriff's acts are the acts and policy of the county for purposes of §1983. (Petition at 45-47.)

The Board of Supervisors of Patrick County, however, has no power or duty to supervise, train or discipline the Sheriff of Patrick County or his deputies. By statute and state constitution, the Sheriff and his department are wholly independent from the County. Local government officials other than the Sheriff have no interest or concern in the enforcement of the criminal laws enacted by the General Assembly and have no power to direct the Sheriff in the training and supervision of members of his department. The Board of Supervisors and Sheriff are separate and distinct constitutional offices. *See* Article VII §4 (Sheriff) and Article VII §5 (Board of Supervisors) of the Virginia Constitution (1971). The powers and duties of the Board are fixed by statute, and they have no powers other than those conferred by the General Assembly either expressly or by implication. *See* 5A MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA *Counties* §34 (1976 Repl. Vol.), and cases cited therein. Even the broadest construction of §15.1-510 *et seq.* of the Code of Virginia, which set forth the general powers of counties, will not support the petitioners' contentions that the County has the duty or power to train and supervise members of the Sheriff's Department. *Cf. Camp* v. *Birchett*, 143 Va. 686, 695, 126 S.E. 665, 129 S.E. 324 (1925) (city treasurer, as constitutional officer, is not subject to direction or control of city council).

The specific responsibility for training and supervision of law enforcement officials in Virginia belongs to the State, and not to the localities. Under Virginia Code §9-107.1 *et seq.*, the

Criminal Justice Services Commission, a component of the state government, is charged with the duty to establish and maintain police training programs throughout the Commonwealth and with the power to establish compulsory minimum training standards for all officers. Virginia Code §§9-109(2), 9-110. The Commission has no connection with individual localities, and it operates on a statewide basis. Any failure of Sheriff Harbour to train, supervise, review, or discipline members of his department may be attributable to the State, but not to the County of Patrick, since the County has no duty to provide such training. Therefore, the State rather than the County would be a proper party to these proceedings, and petitioners' complaints could properly have been dismissed on this alternative ground as to the County.

(2) The Complaints Fail to Allege a Sufficient Factual Basis to Establish That the Actions of the Individual Respondents Were Undertaken Pursuant to "Official Policy" of the County of Patrick.

Assuming for the purpose of argument that acts of the Sheriff are attributable to the County of Patrick, petitioners' allegations are insufficient to establish the existence of an "official policy" as that term has been defined in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), and its progeny. The complaints allege that at some unspecified prior time, unspecified officers of the Patrick County Sheriff's Department embarked on an

> ill-fated, scandalous drug investigation. In the aforesaid instance, said Department had entrusted important undercover duties to an untrained, irresponsible individual, the end result being that numerous criminal prosecutions were aborted because of the previous agent's conduct.

(Witt and Bowman Complaints, ¶5, Petition at 33.) This one prior episode is the sole basis upon which petitioners would have the Court find the existence of a "custom and usage" that is the "official policy" of the County regarding undercover officers.

Under the terms of §1983 as construed in *Monell*, a municipality can be charged with maintaining a *de facto* "official pol-

icy" through "custom and usage" that has acquired the force of law. But in discussing what constitutes such a custom and usage for purposes of §1983 liability, this Court in *Monell* cited with approval the opinion of Mr. Justice Harlan in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970):

> Congress included customs and usages [in §1983] because of the *persistent* and *widespread* discriminatory practices of state officials.... Although not authorized by written law, such practices of state officials could well be so *permanent* and *well settled* as to constitute a "custom or usage" with the force of law.

436 U.S. at 691 (emphasis added).

Cases such as *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied sub. nom. County of Nassau* v. *Owens*, 444 U.S. 980 (1979), and *Turpin* v. *Mailet*, 619 F.2d 196 (2d Cir.), *cert. denied sub. nom. Turpin* v. *City of West Haven*, 101 S.Ct. 577 (1980), on which petitioners rely, ignore this crucial definition. By holding that there need be no showing of a prior pattern of police misconduct, and that a single brutal incident may give rise to a cause of action against a municipality under §1983, the Second Circuit has rendered meaningless the "custom and usage" language of §1983. The Second Circuit has thereby read into the law liability that is not founded on statute, ordinance, regulation, custom or usage, and that is more closely akin to the *respondeat superior* liability that has been expressly rejected by this Court. The "single instance" standard enunciated by the Second Circuit in *Owens* has been rejected by other courts. *See, e.g., Popow* v. *City of Margate*, 476 F. Supp. 1237, 1246 (D.N.J. 1979). *Cf. Smith* v. *Ambrogio*, 456 F. Supp. 1130, 1134 n.3 (D. Conn. 1978).

Under the language of §1983 and this Court's decision in *Monell*, no "official policy" can have arisen as a result of one prior incident in which the Patrick County Sheriff's Department allegedly used an untrained individual in an undercover capacity. It is respectfully submitted that the allegations in the complaints against the County are essentially *respondeat superior* claims that are not cognizable in a §1983 action and that the complaints could properly have been dismissed on this alternative ground as to the County.

CONCLUSION

The courts below correctly decided the principal issue in this case, and their decision conflicts neither with the decisions of other circuits on this issue nor with principles enunciated by this Court. Alternative grounds also exist for dismissing the complaints as to the County. Respondents Harbour, Baliles, and the County of Patrick therefore urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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